CARLSON WHITE (M) SDN BHD

v.

MUTIARA METROPOLIS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ J
[COMPANIES WINDING-UP NO: D1-28-111-96]
3 MAY 1999

COMPANY LAW: *Winding-up - Remedies - Stay of proceedings - Declaring dissolution of company void - Whether provisions of ss. 243 & 307 of Companies Act 1965 must be exhausted first - Whether can proceed by way of appeal to Court of Appeal*

The petitioner presented a petition against the respondent for the latter's inability to pay its debts. At the hearing of the petition, the respondent and its solicitors were absent. The petitioner however elected to withdraw its petition as a post-dated cheque in settlement was received. A supporting creditor was then substituted as the petitioner and the respondent was wound up by the substituted petitioner. The respondent then filed a notice of motion praying for, *inter alia,* an order discharging the winding-up order or alternatively for a stay of proceedings pending appeal. The notice of motion was however withdrawn.

Three years later, the respondent filed a notice of appeal at the Registry of the High Court against the winding-up order. The issue before the court was whether an appeal lies to the High Court without firstly having exhausted the prerequisite provisions of ss. 243 and 307 of the Companies Act 1965 ('the Act').

Held:

[1] Section 243(1) of the Act allows an aggrieved or interested person who has been effected by a winding-up order to invoke the section for a stay of proceedings; and upon obtaining a stay, to invoke s. 307(1) of the Act to declare the dissolution of the company as void.

[2] The respondent's remedy herein was not by way of an appeal to the Court of Appeal, but to first exhaust the provisions of ss. 243 and 307 of the Act. Only if the respondent failed to obtain such relief should it proceed to give a notice of appeal under r. 12 of the Rules of the Court of Appeal 1994 ('the said Rules').

[3] The respondent had failed to satisfy r. 12 of the said Rules in that it failed to file the notice of appeal within the one month period, and thus could not be said to have properly brought the appeal.

[4] The time to invoke s. 307(1) of the Act had also run out against the respondent by effluxion of time as any such application was required to be made within two years of the date of dissolution of the company.

[Order accordingly.]

Legislation referred to:
Companies Act 1965, ss. 243(1), 307(1)
Companies (Winding-up) Rules 1972, r. 32
Courts of Judicature Act 1964, s. 68(1)
Rules of the Court of Appeal 1994, rr. 12, 16

For the substituted petitioner - JH Low; M/s Ching Tan & Assocs
For the respondent - SK Wan (YT Ling with him); M/s SK Wan & Partners

Reported by Ling Hea Hoon

JUDGMENT

KL Rekhraj J:

The petitioners presented a petition against the respondents for their inability to pay the debt in the sum of RM50,000. The petition was fixed for hearing on 25 July 1996. At the hearing, Miss Phang Sweet Ping appeared for the petitioner. Mr JH Low for Selangor Dredging Berhad – a Supporting Creditor; and Puan Sharifah Noraini for the official receiver. The respondents and or their solicitors were absent.

The papers were found to be in order; as the registrars certificate pursuant to r. 32 of the Companies (Winding-up) Rule 1972 had been issued.

The petitioners solicitors at the hearing elected to withdraw the petition; as a **post-dated** cheque in settlement was received; and whereupon, the supporting creditors – the Selangor Dredging Berhad; who having filed a proper notice of intention to appear at the hearing to support the petition, placed themselves as **substituted petitioners;** and prayed that the respondent company be wound-up; as otherwise; the withdrawing petitioners were obtaining a fraudulent preference in the payment.

The **respondents** and or their solicitors having conveniently **elected to absent themselves** at the hearing – the court wound-up the company by substituted petitioner.

Subsequently on 12 August 1996, the respondents through its contributory, Efarzed Holding Sdn Bhd, filed a notice of motion fixed for hearing on 22 August 1996, for an order:

(i) That the winding-up order made against the respondent on 25 July 1996, be discharged;

(ii) Alternatively, the proceedings be stayed pending the respondent's appeal;

(iii) That all proceedings in relation to the winding-up be stayed altogether under s. 243 of the Companies Act ... pending the disposal of Kuala Lumpur High Court Civil Suit No. S4-22-289-96; or until such time the Honourable Court deems fit; and

(iv) In the other alternative, notwithstanding the winding-up order as made; the respondent be granted leave to bring and/or to defend the action, *in lieu* of the liquidator.

The said notice of motion came up for hearing on 4 September 1996, on which date the respondent's solicitors expressed their intention to withdraw the said notice of motion; and the court thereupon dismissed the same with no liberty.

Now after almost three years; on 8 April 1999, a notice of appeal has been filed in the High Court registry against the decision made on 12 July 1996. With respect; and without in any way transgressing into the territorial jurisdiction of the Court of Appeal; but strictly on a **procedural point** the first question is – whether an appeal infact lies to the High Court; without firstly having exhausted the pre-requisite provisions of s. 243 and 307 of the Companies Act 1965. Section 243(1) reads:

> At any time **after an order for winding-up has been made,** the court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, make an order **staying the proceedings** either altogether or for a limited time on such terms and conditions as the court thinks fit.

In other words, this section provides an aggrieved or interested person who has been effected by the winding-up order to invoke s. 243(1) and ask for a stay order; and upon obtaining such an order, to proceed to invoke s. 307 of the Act for an order **to declare the dissolution of the company as void;** as if **not having been dissolved.** As s. 307(1) reads:

> where a company has been dissolved, the court may at any time **within two years** after the date of dissolution, on the application of the liquidator of the company or of any other person who appears to the court to be interested, make an order upon such terms as the court thinks fit in declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

To my mind, the respondents remedy here was not by way of an appeal; but to first exhaust the provisions of the sections; and only when the respondents failed to obtain such a relief; to have proceeded by giving a notice under r. 12 of the Rules of the Court of Appeal 1994, which reads:

> No appeal shall except by leave of the court, be brought after the expiration of one month.

Again, under O. 68(1) of the Courts of Judicature Act 1964, restrictions are placed on appeals to the Court of Appeal; unless leave to appeal is obtained under r. 16 of the Rules of the Court of Appeal 1994:

> Where leave of the Court of Appeal is required, the application for such leave may be made to the court before expiration of the time limited for bringing the appeal or within such enlarged time as the court may allow.

in that besides satisfying the requirement of filing the notice of appeal within the one month against the decision under r. 12; the appellant is also required to apply for leave under r. 16; and only upon such leave being granted, (notwithstanding it being granted outside the one month); it relates back to the time of the making of that application within one month; the appeal is said to have been properly brought.

Subject to the procedural comments made herein above, the respondent has filed to satisfy the requirements of r. 12 in failing to file the notice of appeal within the one month; and thus cannot be said to have properly brought the appeal.

Reading the notice of appeal; the respondents are shown to be unhappy with the decision, in winding-up the company; but the respondents had failed to attend court at the hearing to dispute the debt of the substituted creditors; due notice of that intention to support had been given.

To my mind, taking these facts in the circumstances; and the law governing under the Companies Act, the remedy of the aggrieved party is not by way of appeal to the Court of Appeal; but by way of application to court under notice of motion for a stay order under s. 243(1) of the Companies Act; and followed by a declaratory order under s. 307 of the said Act. There again, the time to invoke s. 307(1) has now run out against the respondent/appellants by an effluxion of time; as any such application was required to be made within **two years** of the date of dissolution of the company.